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[*Lederhaus v. Paschen & Midwest Inspection Service, Ltd.*](#), 91-ERA-13 (ALJ Aug. 9, 1991)

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U.S. Department of Labor
Office of Administrative Law Judges
Seven Parkway Center
Pittsburgh, Pennsylvania 15220

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Date: August 9, 1991
Case No.: 91-ERA-13

In the Matter of

GORDON M. LEDERHAUS,
Complainant,

v.

DONALD PASCHEN,
Respondent,

and

MIDWEST INSPECTION SERVICE, LTD.,
Respondent.

Appearances:

Thomas Nelson, Esq.
For the Complainant

John Dennis McKay, Esq.
For the Respondent

RECOMMENDED DECISION AND ORDER

This is a proceeding brought under the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851 and the regulations promulgated thereunder at 20 C.F.R. Part 24. These provisions protect employees against discrimination for

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attempting to carry out the purposes of the ERA or of the Atomic Energy Act of 1954, as amended, 42 U.S.C.A. § 2011, *et seq.* The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission ("NRC") who are discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

In this proceeding, the Complainant, Gordon M. Lederhaus, contends that he was discharged from employment by Respondents, Donald Paschen and Midwest Inspection Service, Ltd. because he engaged in protected activity, that is, he had contacted the NRC regarding certain conditions and acts by Respondents which he believed were unsafe or violated NRC regulations.

The Assistant Director of the Milwaukee, Wisconsin, regional office of the Employment Standards Administration, United States Department of Labor, found after an investigation that Complainant was a protected employee engaging in a protected activity and that discrimination, as defined by the Act, was a factor in the termination of his employment. Respondent, Donald Paschen, was ordered to offer reemployment to Complainant and to repay wages lost because of the job termination.

Respondent, Donald Paschen, appealed the Employment Standard Administration's order to the office of Administrative Law Judges by Western Union Mailgram received on December 4, 1990, and requested a hearing thereon. A hearing was scheduled for January 10, 1991, in Green Bay, Wisconsin. The hearing was continued at the request of Complainant to allow him time to obtain counsel.¹ The location of the hearing was changed to Milwaukee, Wisconsin, at Complainant's request. Upon notification from Complainant that he had obtained counsel, a hearing was scheduled for April 17, 1991. The parties were allowed two weeks after receipt of the hearing transcript to submit a post-hearing brief. The parties did not receive a copy of the transcript until June 5, 1991. Post-hearing briefs were received on June 24, 1991.

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BACKGROUND

Complainant, Gordon M. Lederhaus, is a certified level II technician in radiography. He is certified in accordance with NRC standards to use radioactive materials in magnetic particle inspection and liquid penetrant inspection. He was employed by Respondent, Midwest Inspection Service, Ltd., for approximately 2-1/2 years, from May 23, 1988 until October 12, 1990, when he was fired by Respondent, Paschen. Paschen is the owner and president of Midwest Inspection Service, Ltd., as well as its radiation safety officer.

Respondent, Midwest, has been in existence for sixteen years. It is a non-destructive inspection company, meaning that it is in the business of analyzing materials without destroying the material. An example of the service it performs is the testing of steel or aluminum ladders to determine whether any flaws exist in the material or welding. Midwest is licensed by the NRC to use radioactive elements in its testing process.

Complainant contends that he was fired by Respondent, Paschen, on October 12, 1990, because he had contacted the NRC on various occasions to report violations of NRC regulations or unsafe practices. Among the contacts was a meeting with an NRC inspector on the evening of October 10, 1990, at a hotel in Green Bay, Wisconsin.

PRIMA FACIE CASE

The requirements for establishing a *prima facie* case under Section 210 were set out by the Sixth Circuit Court of Appeals in *DeFord v. Secretary of Labor et al*, 700 F.2d 281 (6th Cir. 1983). They are: (1) that the party charged with discrimination is an employer subject to the Act; (2) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions, or privileges of employment; and (3) that the alleged discrimination arose because the employee participated in an NRC proceeding under either the Energy Reorganization Act of 1974 or the Atomic Energy Act of 1954. *Id.* at p. 286.²

Initially, Respondents concede that they are subject to the Act.³ Respondent, Midwest, is licensed by the NRC to use radioactive materials in its testing and inspection service. Respondent, Paschen, as the owner, president, and radiation safety officer of Midwest, is also subject to the Act.

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There is no dispute that Complainant was dismissed as an employee with Midwest by Paschen on October 12, 1990.⁴

Protected Activity

The evidence is also clear that Complainant engaged in protected activity. He first initiated contact with the NRC during August or September, 1988, when he had a friend call the NRC to report that Midwest was stealthily keeping one of its employees from being questioned by the NRC. He reported to the NRC that Respondents were keeping the employee out of sight during NRC inspections. A subsequent contact was made when he had the friend call the NRC to report that Paschen's requests for postponements of NRC visits were concocted so that Paschen would have the time to "get his paper organized and to get things caught up that he was supposed to do before the NRC would come in to do an audit."⁵

Complainant also contacted the NRC himself to report that an employee of Respondents was using a radioisotope without the proper certification and without having the appropriate radiation safety training.

Complainant testified that as a result of his surreptitious reports to the NRC, he was contacted by James Cameron, a radiation specialist with the NRC, to set up a meeting on the evening of October 10, 1990, at a motel in Green Bay, Wisconsin. Complainant testified that the subject of the meeting was whether Tim Maurina, a fellow worker at Midwest, had ever used the radioisotope by himself without proper supervision. Cameron corroborated Complainant's testimony. He testified that the NRC received an allegation that Respondent's had an unauthorized employee using radioactive materials and that he did set up the meeting with Complainant.

Reason for Termination

Having shown that he engaged in protected activity and that he was subsequently terminated from his job, Complainant must, as part of his *prima facie* case, present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Dean Dartey v. Zach Company of Chicago*, Case No. 82-ERA-2, *slip op.*, Secretary of Labor,

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(April 25, 1983). *Stack v. Preston Trucking Co.*, Case No. 86- STA-22, *slip op.*, Secretary of Labor, (February 26, 1987), and *Haubold v. Grand Island Express, Inc.*, Case No. 90-STA-10, *slip op.*, Secretary of Labor, (April 27, 1990).

Complainant testified that Respondent, Paschen, told him that he was being fired because he contacted the NRC. Complainant described to the following confrontation occurring at the end of his work day on October 12, 1990, when he went to the front office to turn in his daily worksheets:

When I walked into the office Arlene was sitting -- Mrs. Paschen was sitting at the secretary's desk and I gave her the work orders for the day: the customer's time sheets signed and everything. As I turned around Mr. Paschen was -- I didn't have a tape measure but he was within 18 inches of my face. And, he told me:

"You're terminated"

He says:

"As of now you're terminated."

And I asked him:

"For what?"

And he said:

"I'm sick of you calling the NRC."

That's -- that's words he said:

"I'm sick of you calling the NRC".

And I just kind of backed up a little bit and he said:
"Turn in your equipment and stuff, you're terminated."⁶

Shortly thereafter, Complainant told Paschen that he would be calling the NRC on Monday. Paschen's response was:

"You might as well you have a direct line to them anyway".⁷

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Paschen expressed his displeasure with Complainant contacting the NRC on at least one other occasion. On August 22, 1990, Paschen asked Complainant if he had called the NRC on a certain date to report that an untrained employee was using radiographic material. Complainant denied making the phone call although he had, in fact, initiated the contact by having a friend make the call. (Complainant testified that Paschen did not ask if he knew who made the call and he saw no reason to volunteer the information.) Complainant recounted Paschen's response:

"He also stated to me at that time that there's only three people working for him: myself, the secretary and Tim Maurina, and he has asked all three of us so far, and one of us is a liar because somebody at that shop had called the NRC."⁸

Complainant testified that his working conditions changed after this conversation. The locks were changed on the doors to the front office and the back shop, and Paschen's response to any conversation became curt.

Paschen also became upset when Complainant instructed a customer, Gabe's Construction Company, on how to contact the NRC to report a problem with radioactivity exposure. The incident was triggered when Complainant, while working at Gabe's, was unable to return radiographic material to its storage cabinet. He secured the area and placed a call to Paschen for instructions. While waiting for Paschen to return the call, the safety officer at Gabe's asked Complainant if he knew anyone at the NRC whom he could talk to about the problem. Complainant testified that:

"...[the safety officer] was getting antsy about what was going on. We had been waiting well over an hour -- an hour and fifteen minutes, and they wanted their welding area back and they were concerned. So, talking with Mr. Miner, between myself and him, he asked me if I knew anyone he could talk to at the NRC about it."⁹

Paschen's reaction was that he was upset with Complainant for providing the NRC telephone number to the safety officer.

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Tim Maurina was a non-destructive testing technician with Respondent. Maurina lacked the radiation safety training to be a radiographer. He was apparently the employee who was the subject of the report to the NRC as using radioactive material without the proper certification and training. The reaction of Paschen toward Maurina after Paschen learned of the complaint to the NRC is telling on Paschen's motivation for firing Complainant. Maurina's testimony on Paschen's reaction is as follows:

"[Paschen] said that the NRC was going to be talking to me. And I said "yea" and I said ... whatever questions they would ask of me I would answer as truthfully as I could.

And, he said "yea", ... but he said:

"you don't have to tell them everything", ...

He said that somebody had called the NRC on him and that -- and I said "it wasn't me". And, he said that he felt -- he thought it was Gordy and that he would have to get rid of him.

Q When he said "Gordy", do you know who he was referring to?

A I'm assuming that he was referring to Mr. Lederhaus.

Q Was there anyone else named Gordy who worked for Midwest?

A No."¹⁰

On cross-examination, Maurina testified:

"Q And it's your testimony here that [Paschen] said to you that he thought that Gordy had contacted the NRC?

A Yes.

Q And that statement took place at FWD Seagrave?

A Yes.

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Q On a job site?

A It wasn't directly on the job floor. There's a small room off to the side that we were in.

Q Do you remember the specific words [he] used to you to say to you what you related to the court?

A He said that someone was calling the NRC on him. I said:

"Don I know I didn't call 'em".

He says:

"Well, I think it's Gordy and if it is I'm going to have to get rid of him".

Q And you remember that specific conversation?

A Yes I do.

Q Do you remember the date that the conversation took place?

A August 3rd.

JUDGE BURKE: August 3, 1990?

THE WITNESS: Correct.

BY MR. McKAY:

Q And it specifically happened -- strike that. Had you had any other conversations at all during your term of employment with Don Paschen, regarding the NRC?

A About a week after that he and I were driving out to FWD Seagrave again to do another test on a truck. And, this was after the NRC had come in to do their audit. And, he had said that everything seemed to be okay with the NRC and that he was going to make some changes and just to go along with them but he felt he had some problems with an employee and he was going to take care of it."¹¹

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Tim Maurina's testimony is creditable and clearly corroborates the testimony of Complainant that Paschen knew of Complainant's whistleblower activity with the NRC and that Paschen fired him because of it.

James Cameron's testimony answers the question of how Paschen found out about Complainant's reports to the NRC. Cameron testified that during an inspection or audit of Respondent by the NRC in early August, 1990, he discussed with Paschen the fact that the NRC had received allegations of an unqualified person working with radioactive material. This conversation occurred within days of Paschen's questioning of Complainant and Maurina about the identity of the person who contacted the NRC and Paschen's suspicion that it was the Complainant.

Paschen testified that he did not know that Complainant contacted the NRC until after he had fired Complainant. Paschen's testimony is considered to be not creditable in light of the testimony of Maurina and Complainant that Paschen either knew or suspected that the Complainant was talking to the NRC. Also, his testimony is suspect in light of the testimony of Cameron that he told Paschen that allegations were being made with the NRC about Respondent's practices. Paschen attempts to explain how this did not prompt his suspicion of a whistleblower in the office by proffering the explanation that he believed that the whistleblower was a nephew he had fired in the spring of 1988. However, the reports to the NRC by Complainant involved, at least in part, information such as Maurina working with radioactive matter, that would not have been known to persons outside the operation.

Accordingly, it is determined that the evidence presented by Complainant, in particular, Paschen's statements to Complainant that he was fired because of contacting the NRC, Paschen's statement to Maurina that he would have to get rid of Complainant and Cameron's testimony that he informed Paschen that allegations were filed with the NRC, is sufficient to give rise to an inference that Complainant's whistleblower activity, that is, his reports to the NRC, either his own or through others, was the likely motivating factor for his termination by the Respondents. *Lopez v. West Texas Utilities, supra.*

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RESPONDENTS' REASON FOR TERMINATION

As the Complainant has established a *prima facie* case, the burden of production devolves upon the Respondents to articulate some legitimate, non-retaliatory reason for

the adverse action. *Palmer v. Western Truck Manpower*, Case No. 85-STA-6, 1 OAA 1, p. 269, opinion of the Secretary of Labor (Feb. 24, 1987). The Respondents need not prove the absence of retaliatory intent or motive; they simply must produce evidence to dispel the inference of retaliation raised by the Complainant. *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793 (9th Cir. 1982).

Respondents provide two reasons for the firing of Complainant: (1) that Complainant failed to "lock the camera" after every exposure during an inspection he made at Gabe's Construction Company on October 12, 1991; and (2) Complainant "falsified" a utilization log showing dates that the radioactive source was used.

Complainant returned to Gabe's Construction Company on October 12, 1991 to complete the x-ray work that he had started on October 10, 1991, but was unable to finish because of the delay caused by the difficulty of returning the isotobe to the camera. He was accompanied by Paschen who observed him doing the work. Complainant "shot" thirty-six exposures at pipes. He finished at about 11:00 a.m., and went to another job site to perform the same type of x-ray work for a different customer. While observing Complainant shoot the x-rays at Gabe's, Paschen did not say anything to him about the technique he was using, and or an inspection form¹² that he filled out immediately after the job he characterized the operations observed as "satisfactory."¹³ Nevertheless, he testified that the principal reason that he fired Complainant later that day was because Complainant did not lock the camera after each of the thirty-six exposures.

Paschen refers to Rule 9.2.2-18 of Respondents' Policy and Procedure Manual which requires that the camera be locked after each exposure. Complainant admits that he did not lock the device after each exposure but questions whether such a deviation from procedure is a sufficient reason for his firing, particularly when Paschen did not correct him while observing him take the exposures, and did not correct his techniques before he left for the afternoon job where he would perform the same x-ray work.

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When asked why he did not correct Complainant while observing him, Paschen answered: "Mental shock I guess. I couldn't believe what I was seeing."¹⁴

It strains credibility to accept Paschen's argument that he found Complainant's exposure technique to be so faulty that he would fire him without a warning, yet earlier on that same day, observe him use the technique for 3-1/2 hours without correction, allow him to go on to another job without correction, and note on an inspection form that Complainant's work was satisfactory.

Respondents' second reason for Complainant's termination was that he purportedly falsified information on the Respondents' utilization logs. Paschen testified that after he returned to his office on October 12, 1991, from the Gabes Construction Company site where he observed Complainant take the x-ray exposures, he decided to do an audit on

the company records that had been filled out by Complainant. His investigation revealed that Complainant had written "NU" across the utilization form for July 18, 1990, meaning that the radioactive isotope was "not used" on that date, whereas a client's invoice form and Complainant's time slip showed that the isotope was used that day. Paschen was unable to explain why he considered the error on the July 18, 1990 form to be a "falsification" rather than an oversight or clerical error. At the hearing, Complainant pointed out that Paschen had recently made the same error; that is, he marked the utilization log for August 22, 1990 to show that he did not use the radioactive isotope when, in fact, he had used it. Paschen testified that his error was made because he forgot.¹⁵ Yet, he wishes this Court to believe that the recording error, when made by Complainant, was so egregious, that it constituted a reason to terminate his employment, without a warning or an opportunity for explanation.

It is determined that Respondents have not shown that Complainant's termination was motivated by reasons other than the protected activity. In fact, Respondents, proffered reasons for Complainant's termination are pretextual and not worthy of belief. Complainant's termination of employment was a deliberate retaliation for his contacts with the NRC.

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DAMAGES

42 U.S.C. § 5851(b)(2)(B) provides that once discrimination that is prohibited by the Act is found:

"...the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued."

The Court in *Deford v. Secretary of Labor, supra*, interpreted the above-quoted section as permitting an award of reinstatement to a former job; restoration of all back pay, benefits and entitlements; compensatory damages insofar as they are thought to be appropriate; and reasonable attorney fees and costs.

Former Job

Complainant is not requesting reinstatement to his former job.

Back Pay

Complainant is entitled to back pay from October 10, 1990 until April 1, 1991, when he secured a job with his present employer. Claimant prepared a document (Complainant's Exhibit 7), showing the number of hours he worked during the same period of the prior year. The exhibit shows total number of hours that he worked during October 10, 1989 through April 1, 1990 as 1,176, including 188.5 hours of overtime. Complainant's offer is accepted as a reasonable means of calculating the number of hours of work he missed because of being fired. Complainant assesses his wage for the period of time that he is due back pay at \$12.25 an hour, although he was paid \$11.75 an hour at the time he was fired. Complainant explains that he expected to receive a \$.50

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an hour raise sometime during the fall of 1990. Complainant's hourly wage during the back pay period is determined to be \$11.75. Complainant's expectation of receiving a \$.50 per hour raise is too speculative. He did not have a promise of a raise from Respondent. Complainant was asked if Paschen said anything to him about a raise. Complainant answered:

"Back in May I was asking Mr. Paschen about a raise, an annual review. Every time I would ask Mr. Paschen he'd say:

"We're busy right now we don't have time, we'll talk about it later.
We never did get around to talking about it."¹⁶

Complainant's back pay is calculated as 987.50 hours at \$11.75 per hour or \$11,603.13, plus 188.5 hours of overtime times \$17.62 per hour (Complainant testified that he was paid 1-1/2 times his normal hourly wage for overtime) or \$3,321.37 for a total of \$14,924.50.

Interest

Claimant is also entitled to interest on the \$14,924.50 from the date that the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by Section 6621 of the Internal Revenue Code of 1954.

Compensatory Damages

Complainant seeks compensatory damages for the mental distress and anguish he suffered because of the termination of his employment. The Court in *Wiskotoni v. Michigan National Bank-West*, 716 F.2d 378 (6th Cir. 1983), acknowledged that compensatory or actual damages include compensation for mental distress and anguish. See also, *Restatement, Torts2d* § 905 (1977) and *Smith v. Atlas Off-Shore Boat Service Inc.*, 653 F.2d 1057 (5th Cir. 1981), where the Court held that a seaman discharged

because of a retaliatory action may be entitled to recover compensatory damages for mental anguish suffered as a result of the wrongful discharge.

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Complainant was fired on October 12, 1990; he remained out of work until about April 1, 1991. The record depicts a person who became sullen and distraught over losing his job and having no income. Bill collectors were calling daily, he had no income, he was fighting with the unemployment compensation bureau and he was receiving no help from the NRC. He and his wife argued over the payment of bills and whether they should ask her father for a loan. He had to borrow money from a neighbor for gas to travel to the unemployment office.

Complainant's wife and Ernie Fairchild,¹⁷ a neighbor, testified that Complainant's mood and behavior changed as a result of his job loss. Both described his mood in the fall of 1990 as withdrawn, irritable, and depressed. The holidays were apparently the worse time for Complainant. He did not go to a birthday party his daughter held for his wife in December because he could not afford to hold a birthday party for her, and "didn't have an income to even buy my wife a birthday card...."¹⁸ He testified that traditionally he and his wife had all the family to their home for Christmas, but they did not invite anyone this past Christmas because they could not afford to have Christmas dinner. They were invited to their daughter's home but did not go because they had no money for gifts. Thanksgiving Day and New Years Day were also stark.

Complainant twice considered suicide. He described one occasion on the day after Thanksgiving:

"... Because when I was sitting there deer hunting I looked down that bore of the rifle and the only thing stopping me is that I said the kids aren't there to help my wife.

If they had been home I don't think I'd be here today. It was -- I felt useless. I really felt useless.

I was going 4 months of no income, my wife's getting calls from the bill collectors. She was doing so good at keeping the bills up. I said many times: did I do the right thing helping the NRC or not, by telling what was going on. They'd

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ask me more questions and I'd tell them. Then I'd sit there. I felt that everybody left me out in the cold.

The NRC wasn't there to help me. I was fighting with unemployment. I couldn't get a job. I just didn't know which way to turn anymore."¹⁹

Respondents' argue in their post-hearing brief that the Complainant's evidence is insufficient to support a finding of compensatory damages as no medical or counseling evidence was presented. However, in *Wiskotini, supra*, the Court held that such evidence

is not necessary. The Court reasoned that: "a plaintiff's testimony might be sufficient to support recovery of damages for mental anguish and distress. Accordingly, medical evidence is not required to demonstrate mental anguish sufficient to permit the recovery of exemplary damages." *Id.* at 389.

It is determined that the evidence of Complainant's mental anguish, anxiety, and distress supports a penalty of \$20,000.00.

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED that Respondents be ordered to:

1. Pay to the Complainant, Gordon M. Lederhaus, back pay in the amount of \$14,924.50.
2. Pay to the Complainant interest on the back pay from the date that the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by Section 6621 of the Internal Revenue Code of 1954.
3. Pay to the Complainant the amount of \$20,000.00 in compensatory damages for the mental anguish that he suffered as a result of his job termination.
4. Pay to the Complainant all costs and expenses, including attorney fees, reasonably incurred by him in connection with this proceeding. Thirty (30) days is hereby allowed to Claimant's counsel for submission of an application of attorney fees. A service sheet showing that service has been made upon the Respondents and Complainant must accompany the application.

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Parties have ten days following receipt of such application within which to file any objections.

THOMAS M. BURKE
Administrative Law Judge

TMB/maa

[ENDNOTES]

¹ The Complainant's request for a continuance, and subsequent request for an opportunity to submit a post-hearing brief were considered as constituting a waiver of the speedy decision provisions of 29 C.F.R. 24.3 - 24.6.

² Decisions under Section 210 by the Secretary of Labor in *Dean Dartey v. Zach Company of Chicago*, Case No. 82-ERA-2, slip op., Secretary of Labor (April 25, 1983) and *Lopez v. West Texas Utilities*, Case No. 86-EF 25 (1986), 2 OAA 4, at p. 241, have included a fourth element, that the party charged with discrimination knew of the employee's protected activity. However, it would appear that this element would be included in a showing that the discrimination arose as a result of the protected activity, since the employer would need to have knowledge of the activity to respond to it.

³ See page 1 of Respondent's post-hearing brief and argument.

⁴ See page 1 of Respondent's post-hearing brief and argument.

⁵ N.T., p. 45, lines 7-10.

⁶ N.T., p. 69-70.

⁷ N.T., p. 304.

⁸ N.T., p. 49.

⁹ N.T., p. 61.

¹⁰ N.T., pp. 16 and 17.

¹¹ N.T., pp. 25 and 26.

¹² Cameron testified that the intent of the form as far as the NRC is concerned, is to assure that the radiographer and assistants are conducting operations within the guidelines of the NRC regulations and conditions of the licensee's license.

¹³ See Complainant's Exhibit 3.

¹⁴ N.T., p. 222.

¹⁵ N.T., p. 277.

¹⁶ N.T., p. 93.

¹⁷ Fairchild's testimony was given by Affidavit. See Complainant's Exhibit A.

¹⁸ N.T., p. 98.

¹⁹ N.T., pp. 105 and 106.